

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY TARRER, et al.,

**Plaintiffs,**

CASE NO. C10-5670BHS

## ORDER

## PIERCE COUNTY, et al.,

## Defendants.

This matter comes before the Court on Defendants' Rule 39 and Rule 6 Motion for

Jury Trial (Dkt. 71). The Court has reviewed the briefs filed in support of and in

opposition to the motion and the remainder of the file and hereby denies Defendants'

motion for the reasons stated herein.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On September 20, 2010, Plaintiffs filed their complaint in this matter, which did

not include a jury demand. Dkt. 1. On December 6, 2010, Defendants filed their answer

to the complaint, which did not include a jury demand. Dkt. 26. On January 26, 2011,

Defendants made their jury demand in this case, Dkt. 28. On January 27, 2011, the

1 parties submitted their joint status report (Dkt. 29), which expressed Defendants' request  
2 for a jury trial and Plaintiffs' belief that the jury demand was untimely. The Court, in  
3 response to the joint status report, set this matter to be tried to a jury. Dkt. 30 (minute  
4 order setting trial schedule).

5 On March 17, 2011, Plaintiffs moved to strike Defendants' jury demand. Dkt. 31.  
6 On April 21, 2011, the Court granted Plaintiffs' motion and struck Defendants' jury  
7 demand as untimely. Dkt. 38. On October 6, 2011, Defendants filed the instant motion  
8 for jury trial under Rules 39 and 6 of the Federal Rules of Civil Procedure. Dkt. 71. On  
9 October 17, 2011, Plaintiffs responded (Dkt. 72) and on October 21, 2011, Defendants  
10 replied (Dkt. 75).

## 11 II. DISCUSSION

### 12 A. Jury Demand Standard

13 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, a party may  
14 demand a jury trial on any issue triable of right by a jury by serving the other parties with  
15 a written demand "no later than fourteen days after the last pleading directed to the issue  
16 is served." Fed. R. Civ. P. 38(b). The Seventh Amendment right to a civil jury is not  
17 absolute and may be waived if the request for a jury was not timely. *General Tire &*  
18 *Rubber Co. v. Watkins*, 331 F.2d 192, 197 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964).  
19 Nevertheless, because the right to a jury trial is fundamental, "courts must indulge every  
20 reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393  
21 (1937). A party waives the right to a jury trial under Rule 38 unless the demand is  
22 properly served and filed. *Id.*; *see also, Solis v. Los Angeles*, 514 F.3d 946, 953-54 (9th

1 Cir. 2008); *Pradier v. Elespuru*, 641 F.2d 808, 810 (9th Cir. 1981). In its previous order  
2 on the issue, the Court struck Defendants' jury demand as untimely under Rule 38(b).  
3 See Dkt. 38.

4 If no demand for a jury trial is made, a court may, pursuant to a Rule 39(b)  
5 motion, order a jury trial on any issue for which a jury might have been demanded. Fed.  
6 R. Civ. P. 39(b). However, the Ninth Circuit has held that a district court's discretion  
7 under Rule 39(b) is narrow and "does not permit a court to grant relief when the failure to  
8 make a timely demand results from an oversight or inadvertence." *Zivkovic v. Southern*  
9 *California Edison Co.*, 302 F.3d 1080, 1086-87 (9th Cir. 2002). "An untimely request for  
10 a jury trial must be denied unless some cause beyond mere inadvertence is shown."  
11 *Pacific Fisheries Corp. v. HIH Cas. & General Ins., Ltd.*, 239 F.3d 1000, 1003 (9th Cir.  
12 2001). In addition, legal mistake "does not broaden the district court's narrow discretion  
13 to grant an untimely jury demand." *Pacific Fisheries*, 239 F.3d at 1002 (9th Cir. 2001).  
14 In *Pacific Fisheries*, the Ninth Circuit concluded that "counsel's reasons for his [or her]  
15 errors are of no consequence," concluding that good faith mistakes of law and good faith  
16 mistaken beliefs about what is necessary for a proper jury demand are still inadvertence  
17 or oversight. See 239 F.3d at 1002-1003; see also *Zivkovic*, 302 F.3d at 1087 (concluding  
18 that despite the leeway given to a pro se party, a good faith mistake as to the deadline for  
19 demanding a jury trial establishes no more than inadvertence, which is not a sufficient  
20 basis to grant relief from an untimely jury demand).

21 In addition, under Rule 6(b) of the Federal Rules of Civil Procedure, "[w]hen an  
22 act may or must be done within a specified time, the court may, for good cause, extend

1 the time . . . on motion made after the time has expired if the party failed to act because  
 2 of excusable neglect.” However, where counsel’s inadvertence or oversight is the only  
 3 reason shown to excuse an untimely demand for a jury trial, there is no basis upon which  
 4 the Court may grant relief. *See Pac. Fisheries*, 239 F.3d at 1002 (citing *Lewis v. Time,*  
 5 *Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983), *overruled on other grounds by Unelko Corp.*  
 6 *v. Rooney*, 912 F.2d 1049, 1052-53 (9th Cir. 1990)).

7 **B. Defendants’ Motion**

8 Defendants filed their answer in this action on December 6, 2010 (Dkt. 26), and on  
 9 January 26, 2011, they filed an untimely jury demand (Dkt. 28). Defendants argue that  
 10 the Court has discretion under Rules 39(b) and 6(b) to grant a jury trial in this action.  
 11 Defendants rely on the reasoning from a California case, *Johnson v. Dalton*, 57 F. Supp.  
 12 2d 958, 960-61 (C.D. Cal. 1999), in which the district court granted a jury trial under  
 13 Rule 39(b) for the following reasons:

14 First, Rule 39(b) clearly grants the Court “discretion” to choose to  
 15 override the waiver provision of Rule 38. The Rules do not limit this  
 16 discretion at all.

17 Second, adopting a flexible approach to Rule 39 comports with the  
 18 general intent behind the Federal Rules of Civil Procedure:

19 Technical insistence upon imposing a penalty for failing to  
 20 follow the demand procedure by denying a jury trial is not in the  
 21 spirit of the Federal Rules. The rules do not limit the court’s  
 22 discretion in ordering a jury in cases in which there would have been  
 a right to jury trial. The court ought to approach each application  
 under Rule 39(b) with an open mind and an eye to the factual  
 situation in that particular case, rather than with a fixed policy  
 against granting the application or even a preconceived notion that  
 applications of this kind usually are to be denied.

23 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL  
 24 PRACTICE & PROCEDURE: CIVIL 2D § 2334 (footnotes omitted).

1           Third, although Ninth Circuit cases suggest more narrow discretion  
 2 to grant untimely motions for jury trial, the case law in general upholds the  
 3 discretion of the trial court.

4           Fourth, the Constitution guarantees a right to a jury trial. While the  
 5 waiver provisions raise no constitutional infirmity, it is more in keeping  
 6 with the spirit of the important right at issue to allow a trial judge to  
 7 reinstate the jury trial.

8           Fifth, a narrow reading of Rule 39(b) would in this case allow a  
 9 mistake by counsel to harm the client.

10          Sixth, the jury demand, while untimely, does not prejudice  
 11 defendant. The jury demand was made only a few months late. Trial is still  
 12 many months away. Defendant does not and could not claim prejudice.

13          Seventh, the right to trial by jury is especially important in this  
 14 particular case. In a case such as this one which involves serious allegations  
 15 of racial and sexual harassment and discrimination, the collective wisdom  
 16 of the community should act as a constant guide. When facing such volatile  
 17 issues, the input of the jury can increase the legitimacy and integrity of the  
 18 court system.

19          57 F. Supp. 2d at 961.

20          In *Johnson*, it appears that the district court analyzed the totality of the  
 21 circumstances, along with the text of Rule 39(b), to conclude that it had discretion to  
 22 grant a jury demand. However, here, the Court concludes that Defendants have not met  
 23 the strict requirements laid out by Ninth Circuit case law to show that under Rules 39(b)  
 24 or 6(b), they are entitled to relief from their untimely jury demand. Defendants have not  
 25 shown excusable neglect, or anything beyond oversight and inadvertence, in failing to  
 26 make a timely jury demand. *See Zivkovic*, 302 F.3d at 1086-87; *Pacific Fisheries*, 239  
 27 F.3d at 1003; *see also Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 905 (9th Cir.  
 28 1982) (finding that attorney's mistaken belief that no demand was necessary was nothing  
 29 more than inadvertence and neglect). Therefore, under Ninth Circuit law, their motion  
 30 must be denied.

1 In addition to seeking a jury trial, Defendants argue, in the alternative, that the  
2 Court should try the case with an advisory jury under Rule 39(c). The Court declines to  
3 exercise its discretion to use an advisory jury in trying this case.

4 **III. ORDER**

5 Therefore, it is hereby **ORDERED** that Defendants' Rule 39 and Rule 6 Motion  
6 for Jury Trial (Dkt. 71) is **DENIED**.

7 Dated this 22nd day of November, 2011.

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11 BENJAMIN H. SETTLE  
12 United States District Judge  
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